THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

WASHINGTON ENVIRONMENTAL COUNCIL, *et al.*,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE RESOURCES, *ET AL.* AND PLAINTIFF-INTERVENOR BNSF RAILWAY COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON FOREIGN COMMERCE CLAUSE CLAIMS

NOTE ON MOTION CALENDAR: Friday, March 15th, 2019

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Among the Framers' chief concerns during the 1787 Constitutional Convention was creating a national government that would prevent states with port access from impeding the free flow of foreign commerce to and from the other states. By conferring on Congress the power "to regulate Commerce with foreign Nations," the Constitution did just that. As the U.S. Supreme Court has explained, the federal government's authority over foreign commerce is exclusive and plenary. State actions that infringe on that authority are invalid violations of the dormant foreign Commerce Clause.

Lighthouse Resources, its affiliates, and BNSF Railway Company, the plaintiffs in this case, are attempting to engage in foreign commerce. They have contracted to export coal that they mine in Montana to their Asian customers through a port facility that they control in Washington State. But when they sought state permits for their coal export facility, the Washington Department of Ecology exercised its discretionary powers to permanently block the project. That action both usurps the federal government's exclusive authority over foreign commerce and, separately, ignores the federal government's pro-coal export policies.

Because the undisputed facts show that Defendants' actions contravene the U.S. Constitution's dormant foreign Commerce Clause, Lighthouse and BNSF are entitled to summary judgment in their favor on those claims.

II. STATEMENT OF MATERIAL FACTS

A. The Millennium Bulk Terminal Coal Export Facility

Lighthouse Resources and its affiliate companies (collectively, "Lighthouse") seek to move coal over BNSF Railway Company ("BNSF")'s rail system for export through the

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Millennium Bulk Terminal in Longview, Washington (the "Terminal").[1] The Terminal would export coal from the United States, including from Lighthouse's mines in the Powder River Basin, to countries in Asia, including Japan and South Korea.[2] Indeed, Lighthouse already has coal export contracts with two South Korean government-controlled public utilities,[3] but it is unable to fulfill them due to a lack of terminal capacity.[4] Given the declining domestic demand for coal, greater access to Asian markets is essential to the long-term health of both Lighthouse's mining operations[5] and the economies of coal-producing states.[6]

Lighthouse acquired the Terminal—previously operated as an aluminum smelter, among other things—in 2011.[7] It began the Washington State permitting process for its proposed coal export facility in February 2012.[8] As part of that process, the Washington State Department of Ecology ("Ecology") and Cowlitz County prepared an Environmental Impact Statement ("EIS") pursuant to Washington's State Environmental Policy Act ("SEPA"). After more than four years of environmental review, the Final EIS was published in April 2017.[9]

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[1] ECY.USDC-00670885 at S-1 (Final Environmental Impact Statement for Millennium Bulk Terminals Longview); Dkt. 22-1, BNSF Compl. ¶ 12; Dkt. 119, BNSF Answer ¶ 12.

[2] Declaration of Jordan Sweeney in Support of Plaintiffs Lighthouse Resources, Inc., *et al.*'s Mtn. for Summ. J. ("Sweeney Decl.") ¶¶ 6-7.

[3] Sweeney Decl. ¶¶ 8-9; LH00334097 (Master Coal Sale and Purchase Agreement Between Korea South-East Power Co. Ltd. and Ambre Energy Ltd., Agreement No. KOSEP-2012-1); LH00334168 (Master Coal Sale and Purchase Agreement Between Korea Southern Power Co. Ltd and Ambre Energy Ltd., Agreement No. KOSPO-2012-1).

[4] Sweeney Decl. ¶¶ 11-13. Lighthouse currently exports a relatively small amount of coal through a Canadian port, but it is unable to expand its presence there. *Id*. ¶¶ 12-13. As a result, it cannot provide the volumes specified in the contracts with its South Korean customers. *Id*. ¶ 10-13. There is substantial interest in additional coal volumes from other potential Asian customers, which Lighthouse cannot provide without the Terminal. *Id*. ¶¶ 13-16.

[5] *Id*. ¶ 19.

[6] *See* Dkt 78-1, Mem. in Supp. of Mtn. for Leave to file Amicus Br. at 8-10 (describing Wyoming's and Montana's interests in "access to foreign markets" for coal mined in those states).

[7] Dkt. 1, Lighthouse Compl. ¶¶ 61, 65; Dkt. 118, Lighthouse Answer ¶ 65.

[8] Dkt. 1, Lighthouse Compl. ¶ 70; Dkt. 118, Lighthouse Answer ¶ 70.

[9] *See* ECY.USDC-00670885 (Final Environmental Impact Statement for Millennium Bulk Terminals Longview).

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On September 26, 2017, Ecology denied Lighthouse's request for a water quality certification under Section 401 of the Clean Water Act.[10] In multiple respects, that denial was unprecedented. Most materially, the denial was an exercise of Ecology's never-before-used "substantive" SEPA authority.[11] In addition, the entire denial was—for the first time—issued "with prejudice," meaning that Lighthouse can never reapply for Section 401 water quality certification.[12] Following its Section 401 certification decision, on October 23, 2017, Ecology informed Lighthouse that it would no longer process any of Lighthouse's permit applications for the Terminal.[13]

1. Federal Coal Export Policy

The federal government's policy toward coal exports is well-known. After promising throughout his campaign that he would make American "energy dominance" a foreign and

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[10] Dkt. 1, Lighthouse Compl. ¶¶ 161-162; Dkt. 118, Lighthouse Answer ¶¶ 161-162.

[11] Def. Bellon's Answers to Plaintiff Intervenor BNSF Railway Company's First Set of Interrogatories, Requests for Admission, and Requests for Production, Response to Request for Admission 2 ("Ecology admits that, as of this date, it has not been able to identify another instance in which it denied a permit based on SEPA substantive authority."); Ecology 30(b)(6) Dep. Tr. 108:24-109:4 ("Q How many times has Ecology used SEPA substantive authority to deny a permit license or application? A So far, Ecology has been able to identify one denial using SEPA substantive authority. Q And which one is that? A For the Millennium proposal."); *see also* K. Phillips Dep. Tr. 207:23-208:8 (unable to recall any other instance in which a Washington state agency exercised its substantive SEPA authority to deny a project permit); T. Sturdevant Dep. Tr. 73:18-21 (unable to recall any other instance in which the Department of Ecology exercised its substantive SEPA authority to deny a permit application with prejudice).

[12] Def. Bellon's Answers to Plaintiff Intervenor BNSF Railway Company's First Set of Interrogatories, Requests for Admission, and Requests for Production, Response to Request for Admission 1 ("Ecology admits that, as to those section 401 decisions for which it has been able to obtain records so far, there are no other decisions denying the section 401 certificate expressly 'with prejudice.'"); Ecology 30(b)(6) Dep. Tr. 113:8-11 ("Q This is the singular example of all of the 401 water quality certifications Ecology has ever done where it has denied a water quality certification with prejudice? A Yes. That's correct."); *see also* T. Sturdevant Dep. Tr. 73:15-17 (unable to recall any other instance in which the Department of Ecology ever denied with prejudice a 401 water quality certification).

[13] Dkt 1-4, Letter from M. Bellon, Director, Department of Ecology, to K. Gaines, Lighthouse ("Although Ecology cannot prevent Millennium from filing future permit applications for the proposed coal export terminal, these EIS findings likely preclude Ecology from approving such applications. Therefore, at this time, Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal.").

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economic policy priority of the United States,[14] President Trump issued an Executive Order in March 2017 stating his administration's policy to promote natural resource development as a means of "ensuring the Nation's geopolitical security."[15] Since then, he has consistently articulated the federal government's intention to "export American energy all over the world," citing as one example Ukraine's desire to buy U.S. thermal coal.[16]

The federal government has also emphasized that the United States' role as a "growing supplier of energy resources . . . around the world" is essential to "help our allies and partners become more resilient against those that use energy to coerce."[17] To that end, the United States National Security Strategy explicitly endorses a policy of "expand[ing] our port export capacity through the continued support of private sector development of coastal terminals, allowing increased market access and a greater competitive edge for U.S. industries."[18]

Free trade with Asian allies, including coal export, has been the long-standing policy of the United States stretching back to presidential administrations well before the current one.[19] The Obama Administration, for example, negotiated the U.S.-Korea Free Trade Agreement as a means of facilitating trade between the two countries.[20] Coal exports, including exports to Asia, continued during the Obama Administration, peaking at a total of over 125 million short

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[14] Donald J. Trump, America First Energy Policy Address (May 26, 2016).

[15] Executive Order 13783 (Mar. 28, 2017).

[16] Remarks by President Trump at Unleashing American Energy Event (June 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/.

[17] UNITED STATES NATIONAL SECURITY STRATEGY 23 (2017).

[18] *Id*.

[19] *See* Declaration of Kenji Ushimaru ("Ushimaru Decl.") ¶ 25 ("[T]he Japanese government and many Japanese energy companies view U.S. federal policy as . . . pro-coal export.").

[20] Free Trade Agreement, S. Kor.-U.S, Dec. 3, 2010, 125 Stat. 428 (*entered into force* Mar. 15, 2012).

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tons in 2012—substantially more than was exported during the first year of the Trump Administration.[21] As President Obama succinctly put it, the United States is "the Saudi Arabia of coal."[22]

To synthesize this information, Lighthouse has produced an expert, economist G. David Banks, who served in both the Donald Trump and George W. Bush Administrations. Based on the evidence, his expertise, and his direct experience crafting and articulating federal coal export policy, he is prepared to testify that "the United States' foreign policy has long endorsed improving the energy security of our allies through expanded access to U.S. energy, including coal exports."[23] Specifically, he will say that the United States' policy "is to expand coal production and to increase coal export capacity, including through new West Coast terminals or ports that deliver coal to U.S. allies in Asia."[24] The federal government, in other words, strongly favors construction of projects exactly like the Terminal to do exactly what the Terminal is supposed to do—export U.S. coal to Asia.[25]

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[21] U.S. Energy Information Administration, Annual Coal Report 2017, Table 36, Coal Exports by Country of Destination 1960-2017 (available at https://www.eia.gov/coal/annual/pdf/table36.pdf). Defendants were well aware of the Obama Administration's "all-of-the-above energy strategy," which is what led coal exports to increase "to levels not seen in decades." ECY.USDC-00534040 (Email from Rohan Patel, Special Assistant to the President for Intergovernmental Affairs & Sr. Advisor for Climate/Energy (May 28, 2014)).

[22] Farenthold, David A. & Shear, Michael D., *As Obama Visits Coal Country, Many Are Wary of His Environmental Policies*, Washington Post (Apr. 25, 2010) (available at http://www.washingtonpost.com/wp-dyn/content/article/2010/04/24/AR2010042402711.html?sid=ST2010042500203).

[23] Declaration of G. David Banks in Support of Plaintiffs Lighthouse Resources, Inc., *et al.*'s Mtn. for Summ. J. ("Banks Decl.") ¶¶ 1-7, 16.

[24] *Id*. ¶ 14.

[25] *Id*. ¶¶ 17-21.

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In the face of this evidence concerning federal coal export policy, Defendants have definitively stated in response to discovery requests that they "make[] no contention regarding the policy of the United States with respect to American coal export to Asia."[26]

III. ARGUMENT

A moving party is entitled to summary judgment if it can show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law."[27] An issue of material fact is genuine if the evidence would allow a reasonable fact finder to return a verdict for the nonmoving party.[28] Once the moving party has met this burden, the opposing party must offer specific evidence that reestablishes a genuine, material fact issue before the case can proceed to trial.[29]

A. The Constitution grants the federal government exclusive power over foreign commerce.

"One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased."[30] The Framers were especially concerned about "the peculiar situation of some of the States, which having no convenient ports for foreign

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[26] Def. Bellon's Answers to Plaintiffs' Third Set of Interrogatories and Requests for Production, Response to Interrogatory 15; Def. Inslee's Answers to Plaintiffs' Third Set of Interrogatories and Requests for Production, Response to Interrogatory 11. Consistent with the fact that they make no contention concerning U.S. coal export policy, Defendants have not offered an expert on that issue. Mr. Banks' testimony will thus be unrefuted.

[27] Fed. R. Civ. P. 56(a).

[28] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1985); *Pavoni v. Chrysler Group, LLC*, 789 F.3d 1095, 1098 (9th Cir. 2015).

[29] *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F. 2d 626, 630 (9th Cir. 1987); *Miller v. Glen Miller Productions, Inc.*, 454 F.3d 975, 932 (9th Cir. 2006).

[30] *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283–86 (1976).

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commerce, were subject to be taxed by their neighbors."[31] The Commerce Clause is meant to resolve this problem.[32]

Article I, section 8 gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[33] The foreign Commerce Clause, like its Constitutional neighbors, is more than an affirmative grant of power to Congress. It also restricts states' power to regulate commerce with foreign nations.[34] Unlike the interstate Commerce Clause, however, courts have generally found it unnecessary to delimit this "dormant" aspect of the foreign Commerce Clause.[35]

By 1824, when the U.S. Supreme Court offered its earliest significant explication of the foreign Commerce Clause, it was already "universally admitted" that the clause gives the federal government power over "every species of commercial intercourse between the United States and foreign nations," including foreign commerce "that may commence or terminate at a port within a State."[36] Preventing the states from exercising authority over foreign commerce is the flip side of the same coin. Because the Commerce Clause gives the federal government

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[31] James Madison's Preface to Debates in the Convention of 1787, *reprinted in* RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1966).

[32] *U.S. v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006) ("Born largely from a desire for uniform rules governing commercial relations with foreign countries, the Supreme Court has read the Foreign Commerce Clause as granting Congress sweeping powers.") The Framers understood that the "key to economic prosperity was successful international trade" and that international trade required a national government with the ability to "effectuate any agreement uniformly throughout the nation." Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 Fordham L. Rev. 1955, 1964 (2017).

[33] U.S. CONST. art. I, § 8, cl. 3.

[34] *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 449 (1979) ("The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause.").

[35] *See, e.g.*, *Clark*, 435 F.3d at 1113 ("The Court has been unwavering in reading Congress's power over foreign commerce broadly."); *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) ("The Supreme Court has indicated that when state regulations affect foreign commerce, additional scrutiny is necessary . . . .").

[36] *Gibbons v. Ogden*, 22 U.S. 1, 193, 195 (1824).

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"exclusive and plenary" power over foreign commerce, that power "may not be limited, qualified, or impeded to any extent by state action."[37] Otherwise, the clause would not fulfill the Framers express goal: providing for "the relief of the States which import and export through other States . . . ."[38]

These fundamental principles continue to animate dormant foreign Commerce Clause doctrine. "Foreign commerce is preeminently a matter of national concern" and an area in which "federal uniformity" is frequently "essential."[39] Thus, "the concern in [] Foreign Commerce Clause cases is not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government has remained silent."[40] The dormant foreign Commerce Clause accordingly prohibits states from displacing the federal government's policymaking role in matters of international trade, even when the federal government has not articulated any specific policy.[41] In circumstances where the federal government has spoken, its directions must be followed.[42]

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[37] *Bd. of Trustees of Univ. of Ill. v. U.S.*, 289 U.S. 48, 56-57 (1933).

[38] THE FEDERALIST NO. 42, at 283–85 (James Madison).

[39] *Japan Line*, 441 U.S. at 448.

[40] *Wardair Canada v. Fla. Dep't of Revenue*, 477 U.S. 1, 8 (1986).

[41] "It is crucial to the efficient execution of the Nation's foreign policy that the Federal Government speak with one voice when regulating commercial regulations with foreign governments." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (internal quotation marks and ellipsis omitted).

[42] *See Odebrecht Const., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1315 (S.D. Fla. 2012) (invalidating a state law "interfere[d] with the President's directive under the Libertad Act and other federal statutes . . . .").

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B. Defendants' actions unconstitutionally usurp the federal government's exclusive authority over foreign commerce.

To effectuate the "more extensive constitutional inquiry" that is "required" when state actions involve foreign commerce, the Supreme Court has held that such actions are "inconsistent with Congress' power to 'regulate Commerce with foreign Nations'" whenever they "prevent[] the Federal Government from 'speaking with one voice' in international trade."[43] This can occur in at least two ways. A state action runs afoul of the dormant foreign Commerce Clause if it "*either* implicates foreign policy issues which must be left to the Federal government *or* violates a clear federal directive."[44] Defendants' undisputed actions in this case breach both of these legal standards, especially in light of the "more rigorous and searching scrutiny" that applies in foreign Commerce Clause cases.[45]

1. Defendants' discretionary decision to block the Terminal implicates and impedes federal policy authority over foreign commerce.

a. The federal government must remain the only policymaker in matters affecting international trade.

A central lesson of the Supreme Court's dormant foreign Commerce Clause precedent is that only the federal government is authorized to make policy decisions concerning international trade. "[W]ith respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power."[46] The

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[43] *Japan Line*, 441 U.S. at 446, 453-54. Although this formulation was developed in cases involving state taxation of foreign commerce, the underlying principle applies in other cases too. *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005).

[44] *Container Corp. of Am. v. Franchise Tax Bd.*, 436 U.S. 159, 194 (1983) (emphasis in original).

[45] *Wunnicke*, 467 U.S. at 101. State actions that burden foreign commerce should also be analyzed under the usual framework for addressing claims under the interstate Commerce Clause. *Smitch*, 20 F.3d at 1014.

[46] *Japan Line*, 441 U.S. at 448 (quoting *Bd. of Trustees*, 289 U.S. at 59).

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relevant question is not just ***what policy*** is being articulated, but ***whose voice*** is speaking. Separate and apart from any explicit "federal directive," a state infringes on the federal government's constitutional prerogative to speak with "one voice" in international trade whenever its actions "implicate[] foreign policy issues which must be left to the Federal Government."[47]

The Supreme Court first articulated its "one voice" test in *Japan Line, Ltd. v. Los Angeles County*, a case in which the county attempted to impose a nondiscriminatory property tax on foreign-owned cargo containers passing through its jurisdiction.[48] Analyzing the tax through the lens of the dormant foreign Commerce Clause, the Court stressed the constitutional need for "federal uniformity" in questions implicating international trade.[49] Because "the Federal Government must speak with one voice when regulating commercial relations with foreign governments," the Court explained, states do not have an independent voice in that arena.[50] It accordingly concluded that the county's tax was "inconsistent with Congress' power to 'regulate Commerce with foreign Nations.'"[51]

Defendants here have permanently prohibited construction of a new coal export terminal by denying—with prejudice—a certification essential to the project.[52] To make clear the import of their decision, they subsequently sent a letter to Lighthouse refusing to process any further

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[47] *Container Corp.*, 463 U.S. at 194.

[48] *Japan Line*, 441 U.S. at 436-37.

[49] *Id*. at 448-49, 452-53.

[50] *Id*. at 449 ("The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause.").

[51] *Id*. at 453-54.

[52] Dkt 1-1, Order #15417, *In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals Longview-LLC* ("Section 401 Order").

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permit applications.[53] These actions do more than "implicate[] foreign policy issues which must be left to the Federal Government."[54] As further explained below, they elevate ***state*** policy concerns over federal foreign commerce policy, thereby "prevent[ing] the Federal Government from speaking with one voice in international trade."[55]

b. Defendants' discretionary decision to block the Terminal using its substantive SEPA authority violates the "one voice" principle.

Like the federal National Environmental Policy Act ("NEPA"), Washington's SEPA requires environmental review before government decision making. NEPA is a purely procedural statute; its role ends when environmental review is complete.[56] After an EIS is published under SEPA, however, a Washington state agency "may" deny a request for governmental action if it finds that such action "would result in significant adverse impacts" and that "reasonable mitigation measures are insufficient to mitigate the identified impact."[57] This is sometimes known as "substantive SEPA" authority.[58] Crucially, an agency's decision to employ substantive SEPA authority is entirely discretionary.[59] What is more, Ecology has

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[53] Dkt. 1-4, Letter from M. Bellon, Director, Wash. Dep't of Ecology to K. Gaines, Millennium Bulk Terminals-Longview (Oct. 23, 2017).

[54] *Container Corp.*, 463 U.S. at 194.

[55] *Id*. at 193. Although the Court in *Container Corp.* found no threat of retaliation sufficient to invalidate a state tax scheme, it recognized that state taxes "may . . . have foreign policy implications other than the threat of retaliation" from other nations—to say nothing of scenarios unrelated to state taxes that might implicate foreign policy issues. *Id*. at 194-96. *Cf.* Ushimaru Decl. ¶ 26 ("I see state and local efforts in the U.S. that interfere with the development of U.S. West Coast capacity to export coal as creating political tension with the Japanese.").

[56] *Hapner v. Tidwell*, 621 F.3d 1239, 1244 (9th Cir. 2010).

[57] RCW 43.21C.060. Applicable regulations further require that the agency consider whether a proposal is inconsistent with certain enumerated state policies. WAC 173-802-110(2)(b).

[58] *See Indian Trail Property Owner's Ass'n v. City of Spokane*, 886 P.2d 209, 217 (Wash. Ct. App. 1994).

[59] *Polygon Corp. v. City of Seattle*, 578 P.2d 1309, 1312-13 (Wash. 1978); *see* Ecology 30(b)(6) Deposition 108:15-18 ("Q: . . . Is Ecology's use of SEPA substantive authority mandatory or discretionary? A: SEPA substantive authority is supplemental. It's discretionary.")

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conceded that its discretionary decision to block the Terminal in this case is the first instance in which it has used its substantive SEPA authority to deny a proposal.[60]

A discretionary decision under SEPA—especially an unprecedented discretionary decision—is inherently a policy choice.[61] Here, Ecology made its policy choices explicit. Throughout its Section 401 Order, Ecology repeatedly invoked "substantive SEPA policies" as reasons for denying Lighthouse's requested certification with prejudice.[62] The Section 401 Order never mentions federal trade policy or federal authority over foreign commerce, and Ecology has never claimed that it considered those issues. In this way, Ecology decided that its own policy "voice"—not the federal government's—would determine whether a new port would be opened to foreign commerce. Such a policy decision is outside the State of Washington's authority under the dormant foreign Commerce Clause.

To the extent Defendants contend that their exercise of substantive SEPA authority turned on state policies, as opposed to federal ones, they miss the point. The key question is whether their actions "implicate[] foreign policy issues which must be left to the Federal Government."[63] A state decision that blocks operation of a terminal designed to facilitate foreign commerce necessarily "implicates" foreign policy issues. A discretionary state decision

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[60] Def. Bellon's Answers to Plaintiff Intervenor BNSF Railway Company's First Set of Interrogatories, Requests for Admission, and Requests for Production, Response to Request for Admission 2 ("Ecology admits that, as of this date, it has not been able to identify another instance in which it denied a permit based on SEPA substantive authority."); Ecology 30(b)(6) Deposition 108:24-109:4 ("Q: How many times has Ecology used SEPA substantive authority to deny a permit license or application? A: So far, Ecology has been able to identify one denial using SEPA substantive authority. Q: And which one is that? A: For the Millennium proposal.").

[61] *W. Main Assocs. v. City of Bellevue*, 742 P.2d 1266, 1273 (Wash. Ct. App. 1987) ("SEPA decisions are discretionary and involve the weighing of various environmental policies.").

[62] Section 401 Order at 5, 6, 7, 9 & 10; *see also id.* at 11, 13 (referencing "Ecology SEPA policies").

[63] *Container Corp.*, 463 U.S. at 194.

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that permanently precludes operation of such a terminal based on state policy considerations improperly shifts policy responsibility from the federal government to the state. Because Defendants' action in this case thwarts the federal "policy of uniformity" that is "embodied in the Commerce Clause," it is unconstitutional, even absent a specific policy statement from the federal government.[64]

c. Denying Lighthouse's request for certification with prejudice was also a discretionary decision that violates the "one voice" principle.

In addition to its maiden use of substantive SEPA authority, Ecology broke new ground when it denied Lighthouse's Section 401 water quality certification "with prejudice."[65] Defendants now apparently claim that this decision to conclusively refuse Lighthouse's request rested on both Ecology's substantive SEPA authority and its determination that Lighthouse had not provided "reasonable assurance" that the Terminal would conform to state water quality standards.[66] In the past, however, they have conceded that "Ecology did not deny the certification 'with prejudice' based on [alleged water quality] deficiencies . . . ."[67] Regardless, the use of agency authority to act "with prejudice" was a discretionary decision that cannot withstand foreign Commerce Clause scrutiny.

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[64] *Wardair*, 477 U.S. at 8.

[65] Def. Bellon's Answers to Plaintiff Intervenor BNSF Railway Company's First Set of Interrogatories, Requests for Admission, and Requests for Production, Response to Request for Admission 1 ("Ecology admits that, as to those section 401 decisions for which it has been able to obtain records so far, there are no other decisions denying the section 401 certificate expressly 'with prejudice.''); Ecology 30(b)(6) Dep. Tr. 113:8-11 ("Q This is the singular example of all of the 401 water quality certifications Ecology has ever done where it has denied a water quality certification with prejudice? A Yes. That's correct.").

[66] *See* Bellon. Dep. Tr. 60:15-61:4 (stating "there could have been an issue in terms of denying with prejudice on the water quality side as well and even if you take the SEPA concerns off the table").

[67] Pollution Control Hearings Board, No. 17-090, Ecology's Reply in Support of Motion for Partial Summary Judgment, at 2 (May 2, 2018). *See also* Pollution Control Hearings Board, No. 17-090, Dec. of Sally Toteff (May 2, 2018) ("If Director Bellon had decided not to use Ecology's SEPA substantive authority to deny the Section 401 certificate, [] Ecology most likely would have ultimately denied the certification without prejudice.").

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Section 401 of the federal Clean Water Act provides that an applicant for certain federal permits must first seek state certification that discharges into navigable waters will comply with applicable water quality standards.[68] In its Section 401 Order, Ecology concluded that Lighthouse had "fail[ed] to demonstrate reasonable assurance" that the Terminal would "meet applicable water quality standards and other requirements of state law."[69] Defendants have acknowledged that, under these circumstances, they had the option to deny Lighthouse's Section 401 certification request ***without*** prejudice.[70] In fact, the evidence shows that Ecology had prepared—and even signed—a letter that would have allowed Lighthouse to submit additional water quality information.[71] When Defendants later decided to instead deny Lighthouse's water quality certification ***with*** prejudice, they were exercising policymaking discretion.[72]

Again, because the Terminal is by nature an instrumentality of foreign commerce, this discretionary decision substituted the state's policy priorities and judgment for the federal government's policy priorities and judgment. Because the federal government's authority over

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[68] 33 U.S.C. § 1341(a).

[69] Section 401 Order at 13.

[70] Pollution Control Hearings Board, No. 17-090, Dec. of Sally Toteff (May 2, 2018) ("If Director Bellon had decided not to use Ecology's SEPA substantive authority to deny the Section 401 certificate, [] Ecology most likely would have ultimately denied the certification without prejudice."); *see also* Toteff Dep. Tr. 203:7-14 (explaining that Ecology had worked on different versions of decision documents for "all pathways").

[71] *See* Toteff Dep. Ex. 299 (signed draft letter from S. Toteff to K. Gaines dated September 6, 2018 denying Section 401 certification without prejudice); Toteff Dep. Tr. 212:3, 212:24-213:4 (explaining that this draft letter "conveyed an interpretation that Ecology was making decision on the 401" to deny without prejudice).

[72] *See* Bellon Dep. Tr. 249:18-23 ("Quite frankly, in good conscience I didn't feel in good conscience that simply issuing a denial without prejudice was fair to the company who had been asking of me that I provide regulatory certainty and decision-making in a timely manner so that they could make decisions accordingly.").

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international trade is "exclusive and plenary," the Constitution prohibits states from effecting foreign commerce policy in this manner.[73]

1. Blocking the Terminal violates the federal government's clear directives regarding coal exports.

In addition to substituting their own policies for the federal government's, Defendants' actions in this case "violate[] a clear federal directive" regarding coal exports.[74] That violation is independent grounds for invalidating their actions under the dormant foreign Commerce Clause.

The substance of federal policy concerning coal exports is not up for serious debate—especially because Defendants have stated that they "make no contention" concerning that policy.[75] The United States has an abundant supply of coal and other energy resources that the federal government has long sought to export, especially to its allies.[76] That policy is most recently and pointedly stated in the 2017 United States National Security Strategy. Under the heading "Priority Actions," the National Security Strategy states that "[t]he United States will ***promote exports of our energy resources*** . . . , which helps our allies and partners diversify their energy sources and brings economic gains back home."[77] It goes on to promise that the

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[73] *Bd. of Trustees*, 289 U.S. at 56.

[74] *Container Corp.*, 463 U.S. at 194.

[75] Def. Bellon's Answers to Plaintiffs' Third Set of Interrogatories and Requests for Production, Response to Interrogatory 15; Def. Inslee's Answers to Plaintiffs' Third Set of Interrogatories and Requests for Production, Response to Interrogatory 11.

[76] Banks Decl. ¶ 9; *see* Letter from Jay Inslee, Gov. of Wash., and John Kitzhaber, Gov. of Or., to Nancy Sutley, Chair, Council on Envtl. Quality (Mar. 25, 2013) ("The recent interest in coal export shipping terminal along the west coast, along with decreasing domestic demand, is a clear indication that the U.S. could become a significant supplier of coal to Asia."); ECY.USDC-00326111 (acknowledging that the Terminal represents a "new vital transp. link to Asia and their high demand for coal").

[77] UNITED STATES NATIONAL SECURITY STRATEGY 23 (2017) (emphasis added).

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United States "will expand our export capacity through the continued support of ***private sector development of coastal terminals***, allowing increased market access and a greater competitive edge for U.S. industries."[78]

The message of the National Security Strategy is clear. The federal government has made it a policy priority to export U.S. energy resources—including coal—through private terminals. That policy is underscored by numerous actions and public statements from current Administration officials.[79] Indeed, President Trump himself has stated that the United States intends to "export American energy all over the world."[80] U.S. allies in Asia have praised this policy, and made several public statements supporting U.S. coal exports generally and Lighthouse's plans for the Terminal in particular.[81]

Drawing on all of these statements and actions, as well as his direct experience working in the Trump Administration, Lighthouse's expert witness, G. David Banks, will testify to the

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[78] *Id*. (emphasis added).

[79] *See, e.g.*, *Secretary Ross and Secretary Perry Hail New Coal Deal with Ukraine*, LH00371060;*U.S. Eyes West Coast Military Bases to Export Coal*, LH00336763 (Secretary Zinke commented that "it's in our interest for national security and our allies to make sure that they have access to affordable energy commodities"); LH00336763 (proposal to export coal from military bases on the West Coast); Press Release, Joint Press Release from Vice President Mike Pence and Deputy Prime Minister Taro Aso on the Second Round of U.S.-Japan Economic Dialogue, LH00331257; Secretary Zinke Statement in Support of President Trump's American Energy Executive Order, LH00329494 ("President Trump took bold and decisive action to end the War on Coal and put us on track for American energy independence…[A]chieving American energy independence will strengthen our national security by reducing our reliance on foreign oil and allowing us to assist our allies with their energy needs.").

[80] Remarks by President Trump at Unleashing American Energy Event (June 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/.

[81] Ushimaru Decl. ¶ 16 ("[B]ecause of its low sulfur content and other physical characteristics, coal from the Western U.S., particularly the Powder River Basin, is an ideal fuel for Japan's new highly-efficient power plants."); Interview with Yoichiro Yamada, Japanese Consul-General to the United States, LH00335826 ("And for [Japan's clean coal] technology, the low sulfur, low temperature, for the melting of ashes, a type of coal which is produced in Montana and Wyoming are the best suited. Therefore, we would love to see those coal to be available for Japan...[Japan has] great vulnerability in the energy security . . . . The supply of energy is a national security issue . . . ."); Interview with Masana Ezawa, Director of the Clean Coal Division, Japan Ministry of Economy, Trade and Industry, LH00335823 ("[Japan] import[s] coal from Australia so that diversification of exporting countries [is] a crucial policy for [Japan's] energy supply . . . . U.S. coal is a good solution for our high efficient coal-powered power plant.").

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same federal policies.[82] "United States policy is to maximize exports of energy resources, which includes thermal coal that is mined in western U.S. states."[83] The goal of this federal government policy is "to help provide a reliable global supply of affordable and reliable energy, particularly for [U.S.] allies and partners."[84] In sum, it is the United States' policy "to expand coal production and to increase coal export capacity, including through new West Coast terminals or ports that deliver coal to U.S. allies in Asia."[85]

This federal policy favoring coal export qualifies as a "clear federal directive," the violation of which transgresses the dormant foreign Commerce Clause.[86] And there can be no doubt that Defendants' actions with respect to the Terminal violate it. On its face, their decision to block the Terminal by denying Lighthouse's request for Section 401 certification with prejudice prevents the export of U.S. coal to Asian allies through a private port. To make matters worse, if other states—or even just California and Oregon—were to "follow [Washington's] example," U.S. coal exports to Asia would be completely stymied.[87] Washington, "by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade."[88] When it does, its actions harm both companies like

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[82] Banks Decl. ¶¶ 2-16.

[83] *Id*. ¶ 18.

[84] *Id*. ¶ 10.

[85] *Id*. ¶ 14.

[86] *See Container Corp.*, 463 U.S. at 194; *Odebrecht Const.*, 876 F. Supp. 2d at 1315-16.

[87] *See Japan Line*, 441 U.S.at 453; *cf.* Dkt. 136, States of Cal., Md., N.J., N.Y. and Ore., and the Commonwealth of Mass.'s Corrected Amicus Br. in Support of Defendants' Mtn. for Summ. J. on Preemption Issues (arguing in support of Defendants' decisions in this case).

[88] *See Japan Line*, 441 U.S. at 453.

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Lighthouse and BNSF that are engaged in foreign trade, and states like Wyoming and Montana whose economies depend on that foreign trade.

IV. CONCLUSION

Defendants cannot dispute that their with-prejudice denial of the Terminal's Section 401 certification was a discretionary policy decision. By nature, that decision impermissibly elevated state policies over federal foreign trade policy. It also ignored clear federal directives concerning coal exports. For each of those reasons, Defendants' actions violated the dormant foreign Commerce Clause, and Lighthouse and BNSF are entitled to summary judgment.

Dated this 12th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

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